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ROBERT SEAVER, CLE

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. 840

IB OTTO ASTRUP, *Petitioner*

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
DEPARTMENT OF JUSTICE, *Respondent*

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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No.

IB OTTO ASTRUP,
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vs.

IMMIGRATION AND NATURALIZATION SERVICE, DEPARTMENT OF JUSTICE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

Petitioner Ib Otto Astrup, Appellant below, respectfully prays that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Ninth Circuit affirming an Order of the District Court for the Northern District of California. The District Court's Order was one denying petitioner's Petition for Naturalization; the Court of Appeals affirmed, Judge Plummer dissenting.

OPINION BELOW

The decision of the Court of Appeals is not yet reported; it is printed as Appendix "A" to this Petition. The Memorandum of Decision of the District Court, which is unreported, is printed as Appendix "B" to this Petition.

JURISDICTION

1. The judgment sought to be reviewed was entered on July 8, 1970. The time for filing this petition has been, by order of Mr. Justice Douglas, extended from October 6, 1970 to October 16, 1970.

2. The statutory provision which confers jurisdiction on this Court to review the judgment in question is 28 U.S.C.A., sec. 1254(1).

3. The grounds upon which that jurisdiction is invoked are that the Court of Appeals in affirming the denial of Petitioner's Petition for Naturalization has decided an important question of federal law relating to eligibility for citizenship, which has not been, but should be, considered and settled by this Court.

QUESTIONS PRESENTED

1. Whether Section 315 of the Immigration and Nationality Act should be interpreted to mean that an alien who signed a request for exemption from military service under the impression that he would be permanently exempt from military service should be disbarred from citizenship notwithstanding the fact

that his draft exemption was removed by Congress and that consequently he would have served this country during the Korean War but for the fact that he did not pass his induction physical examination.

2. Whether Section 315 of the Immigration and Nationality Act, when interpreted by the courts to grant citizenship to those aliens who requested exemption from military service but were inducted into the Armed Forces while denying citizenship to similarly situated aliens who could not pass the physical examination, creates such an unreasonable classification that it violates the guarantee of due process of law.

3. Whether a denial of citizenship to an alien when he could not serve in the military because of a physical disability violates the Eighth Amendment's proscription of "cruel and unusual punishments."

4. Whether the signing of a request for relief from training and service in the armed forces, executed under the mistaken belief that it did in fact relieve one perpetually from military training and service, is a "knowing waiver" of eligibility for citizenship.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment, Due Process Clause:

> ". . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law. . . ."

United States Constitution, Eighth Amendment:

"Excessive bail shall not be required . . . nor cruel and unusual punishments inflicted."

Section 315 of the Immigration and Nationality Act, 8 U.S.C. section 1426(a):

"Notwithstanding the provisions of section 405(b) of this Act, any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in National Security Training Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States."

Section 4(a) of the Selective Service Act of 1948, 62 U.S. Stats. 604, 605-606:

"Any citizen of a foreign country, who is not deferrable or exempt from training and service under the provisions of this Title (other than this subsection), shall be relieved from liability for training and service under this Title if, prior to his induction into the armed forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President; but any person who makes such application shall thereafter be disbarred from becoming a citizen of the United States."

STATEMENT OF THE CASE

1. Jurisdiction of the Courts Below.

This is an appeal from an order entered on November 15, 1968, by the United States District Court for the Northern District of California denying petitioner's Petition for Naturalization. The petition was brought under the provisions of Section 316(a) of the Immigration and Nationality Act. The District Court's jurisdiction was invoked under the provisions of said Act, and the Court of Appeals had jurisdiction in the case by virtue of 28 U.S.C. §§ 1291 and 1294.

2. The Petition of Ib Otto Astrup for Naturalization.

Petitioner was born in Denmark on November 23, 1926. On February 20, 1950 he was lawfully admitted to the United States for the purpose of permanent residence. In August of 1950 petitioner registered under the Selective Service Act of 1948 and in the following month, September 20, 1950, was classified I-A and ordered to report for induction. (R.T. 4, 77).

On November 14, 1950 petitioner, who had just completed a fourteen month tour of duty with the Danish Navy and was not certain that he wished to become a permanent United States resident, executed SSS Form 130, a request for exemption from military service on the ground of alienage, believing such exemption would be permanent. The next day he was reclassified IV-C. The IV-C classification (alien not currently liable for military service) was granted pursuant to §4(a) of the Selective Service Act of 1948 (50 U.S.C. App. §454(a)(1950)).

In 1951 Congress amended the Selective Service Act of 1948 so that §4(a) no longer provided the procedure for the exemption of resident aliens, and, on August 6, 1952, pursuant to that change, petitioner's draft board reclassified him I-A. Petitioner wound up his personal affairs and informed his employer that he was being drafted and would be gone for two years. But on September 2, 1952, he was examined and found not physically fit for military service. On November 24, 1952, his draft board reclassified him V-A (registrant over the age of liability for military service). (R.T. 4, 77-78).

In December 1952 the Immigration and Nationality Act of 1952 became effective. Section 315(a) of that Act, which the Appellate Court held to bar petitioner from naturalization, changed the scope of the debarment for citizenship to provide that debarment occurred only if the alien applies or has applied for relief *and* "is relieved . . . on such ground."

On May 14, 1965 petitioner filed his petition for naturalization. (R.T. 1-2). The Immigration and Naturalization Service opposed the petition. The District and Appellate Courts found petitioner ineligible for citizenship.

REASONS FOR GRANTING THE WRIT

Petitioner seeks to become a citizen of the United States, where he has lived for twenty years. The significance of citizenship, and the consequences of its absence, have been eloquently described by this Court

in *Trop v. Dulles,* 356 U.S. 86 (1958) and there is no reason to reiterate its importance here. Suffice it to say that denial of citizenship, for no rational reason, is a grave injustice and that that is precisely what has happened here.

Petitioner did, true enough, execute a request for exemption from military service. But he was not actually relieved from military service because of the execution of the request and, but for the Ninth Circuit's decision in *Lapenieks v. Immigration and Naturalization Service,* 389 F.2d 343 (9 Cir. 1968), *cert. den.,* 391 U.S. 951 (1968), his petition would surely have been granted under the rule of *United States v. Lacher,* 299 F.2d 919 (9 Cir. 1962). *Lacher,* consistent with the Second Circuit's decision in *United States v. Hoellger,* 273 F.2d 760 (2 Cir. 1960) and this Court's opinion in *Ceballos v. Shaughnessy,* 352 U.S. 599 (1957) held that section 315(a) contains a two-pronged test; that is to say, before one can be held to have forfeited all hope of becoming a citizen he must not only have applied for an exemption from military service but also have been effectively relieved of military obligations. Lacher had, like petitioner here, executed the request for exemption but had not been relieved from service. He had been drafted and inducted into the Armed Forces. *Lapenieks* presented a case identically factual to *Lacher* except for one feature: Lapenieks flunked the physical and, because of that difference, was denied citizenship. But surely flunking a physical is no reason for denying a person citizenship and although the *Lapenieks* Court gave

that as the reason for distinguishing the case from *Lacher* there was, as Judge Duniway emphasized in his thoughtful *Lapenieks* dissent (389 F.2d at 347), another underlying reason for distinguishing the cases. By postponing his induction Lapenieks managed to avoid the Korean conflict and would not have served in time of war even had he passed the physical. Petitioner, on the other hand, did, like Lapenieks, flunk his physical but, unlike Lapenieks, petitioner, had he passed, would have served during the Korean conflict. But since petitioner flunked his physical and since the reason given for the distinction between *Lacher* and *Lapenieks* was that the former had passed his physical, petitioner's was deemed a *Lapenieks* case. Accordingly, petitioner has been denied citizenship pursuant to the dead hand of a tortured precedent dictated by emotions inapplicable to petitioner's case. No Court has suggested that the result is reasonable or that denying petitioner citizenship can rationally be justified. The District Court simply held that "this court is bound by *Lapenieks*" (Appendix B, p. vi) and the Court of Appeals disposed of the case with a one-page decision citing *Lapenieks* (Appendix A).

We do not know how many persons are in a position similar to petitioner's. The recitation of cases contained in the appendix to *United States v. Hoellger,, supra,* 273 F.2d, 764-766 suggests that not an inconsiderable number of people are being deprived of citizenship pursuant to a rule that has no support in reason and is inconsistent with the language of this

Court's *Ceballos* decision. This case is thus an important one and raises issues that, we respectfully urge, should be resolved by this Court. We now turn to those issues.

A. THIS CASE PRESENTS AN IMPORTANT AND UNSETTLED QUESTION OF FEDERAL LAW

This case presents an important question of federal law concerning the nature of eligibility for citizenship which has not been settled by this Court. In *Ceballos v. Shaughnessy,* 352 U.S. 599, 601 (1957) this Court ruled that "Section 315 of the 1952 Act enacts a two-pronged requirement for the determination of permanent ineligibility for citizenship: the alien must be one 'who applies or has applied for exemption,' and also one who 'is or was relieved or discharged from such training or service on such ground.'" But this Court has not decided whether the sort of "exemption" afforded this petitioner—the mere temporary granting of exemption followed by its withdrawal—constitutes "relief" within the meaning of the two-pronged requirement.

B. THERE IS A CONFLICT AMONG THE FEDERAL COURTS

A clear conflict exists among the Circuit Courts of Appeals and among the District Courts. In *United States v. Hoellger,* 273 F.2d 760 (2 Cir. 1960) and in *United States v. Lacher,* 298 F.2d 919 (9 Cir. 1962) citizenship was granted subsequent to an exemption based on alienage because the petitioners in those

cases had passed the induction physical examination and served in the armed forces. In *United States v. Bazan* 228 F.2d 455 (D.C. Cir. 1955) (per curiam) citizenship was granted even though the alien had applied for an exemption and was not inducted. But in *Lapenieks v. Immigration and Naturalization Service,* 382 F.2d 723 (9 Cir. 1968) and in this case citizenship was denied.

Furthermore, it is clear that if petitioner had appealed the administrative decision to the District Courts of New York or Illinois, where aliens have been granted citizenship in circumstances legally identical to those of this petitioner, he would now be naturalized. See, *Petition for Naturalization of Joseph Kadich,* 221 F.Supp. 353 (S.D.N.Y. 1963); *In re Wendt,* 300 F.Supp. 725 (N.D. Illinois, E.D. 1969).

Where a question as fundamental as eligibility for citizenship is at issue, the exercise of this Court's certiorari jurisdiction is fully justified to the end that a uniform and orderly rule of eligibility develop. A judgment that is dictated by geography is manifestly an unfair decision.

C. THE NINTH CIRCUIT'S INTERPRETATION OF SECTION 315(a) SUFFERS FROM A NUMBER OF CONSTITUTIONAL INFIRMITIES

a. The rule which obtains in the Ninth Circuit is predicated on an irrational classification in which an applicant's ability to pass a military physical examination is the determining factor in his eligibility for

citizenship. The effect of the Ninth Circuit's rule is that an alien who passes a physical examination and serves in the Armed Forces during a time when this country is at peace is granted naturalization (*United States v. Lacher*) while the alien who would have served during the Korean War (had he passed his physical examination) is denied naturalization.

The federal government, no less than the state government, is precluded from making irrational classifications. *Bolling v. Sharpe,* 347 U.S. 497 (1954). And "a statutory classification must be based on differences that are reasonably related to the purposes of the Act in which it is found." *Morey v. Doud,* 354 U.S. 457, 465 (1957) (footnote omitted). There is no conceivable relationship between the ability to pass a Selective Service physical and the ability to be a good citizen.

b. Barring petitioner from citizenship because of his physical disability also violates the Eighth Amendment to the United States Constitution. Denial of citizenship is "punishment" within the meaning of the Amendment's proscription of "cruel and unusual punishments." A statute is considered nonpenal only if its imposition of a disability is not punitive but designed to accomplish some other legitimate purpose, *Trop v. Dulles,* 356 U.S. 86, 96 (1958). The only reason for denying citizenship to petitioner is a punitive one (no one contends he would not make a good citizen) and, but for his illness, he would have passed his physical examination, served in the Armed Forces and become a citizen. Petitioner is being punished for

his failure to pass a physical examination and punishing a person because of his illness has been explicitly held to violate the Eighth Amendment. *Robinson v. California,* 370 U.S. 660 (1962). In that case this Court noted that imprisonment for but one day for the crime of having a common cold would constitute cruel and unusual punishment; here petitioner is punished for the remainder of his life.

c. A third constitutional problem emerges because §315 permits the military to become the arbiter of citizenship. Justices Douglas and Black, concurring in *Trop v. Dulles,* observed that "nothing in the Constitution or its history lends the slightest support for such military control over the right to be an American citizen." (356 U.S. at 105). If the military does not have such control when the individual in question has committed the crime of desertion, then clearly it should have no control over citizenship when the individual has committed no crime save to be physically unacceptable to the Armed Forces.

D. PETITIONER DID NOT MAKE A KNOWING WAIVER OF HIS ELIGIBILITY FOR CITIZENSHIP

Petitioner signed the "Application By Alien For Relief From Training And Service In The Armed Forces" on November 14, 1950. The application provided that: "I hereby apply for relief from liability and training in the armed forces of the United States." (R.T. 74). That wording was consistent with §4(a) of the Selective Service Act of 1948, 62 U.S.

Stats. 604, 605-606.[1] That law provided, in pertinent part:

> "Any citizen of a foreign country, who is not deferable or exempt from training and service under the provisions of this Title (other than this subsection), shall be relieved from liability for training and service under this Title if, prior to his induction into the armed forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President; but any person who makes such application shall thereafter be disbarred from becoming a citizen of the United States."

Petitioner signed the application for relief because he had only been in the country for nine months, had not yet made up his mind whether he wanted to become a permanent resident and because he had just completed a tour of duty in the Danish Navy. (J.R.T. 7).[2]

In June of 1951, however, Congress passed the Universal Military Training and Service Act, 65 U.S. Stats. 75, which provided, in §4(a), that relief from military training was available only to those aliens who have "remained in the United States in a status other than of a permanent resident for a period ex-

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[1]In *Lapenieks v. Immigration and Naturalization Service, supra,* treaty rights were involved. There are no pertinent treaty, obligations between the United States and Denmark and this petitioner, in claiming exemption from the draft, was relying exclusively on rights created by the statutes of the United States.

[2]J.R.T. refers to the Reporter's Transcript of the hearing of July 16, 1968.

ceeding one year. . . ." It was this provision that resulted in the removal of petitioner's "relief from liability." And it was on the basis of this provision that, on August 6, 1952, petitioner's local board reclassified him I-A and, twelve days thereafter, order him to report for induction into the armed services. Petitioner reported as ordered but was found physically unfit for the service. The determination that petitioner was physically unfit came as a surprise to him; he had wound up his personal affairs expecting that he would be gone for a period of two years. (J.R.T. 9). In December of 1952, the Immigration and Nationality Act of 1952 became effective. Section 315(a) of that Act, which the District and Appeals Courts held to bar petitioner from naturalization, changed the scope of the debarment for citizenship to provide that debarment only occurred if the alien applies or has applied for relief *and* "is relieved . . . on such ground." Thus it was §315(a) that introduced the "two-pronged" requirement.

Petitioner can hardly be held to a standard of clairvoyance that would require him to anticipate the Acts of Congress of 1951 and 1952 which removed his relief from services in the armed forces. As Judge Moore observed in his concurring opinion in *United States v. Hoellger, supra,* 273 F.2d at 766:

> "Appellee fully understood the consequences of his election in claiming draft exemption. He traded ineligibility to become a citizen against relief from service—not a mere temporary stay or deferment subject to cancellation. However, the government's part of the bargain was that he be

> relieved from service. When the government by its own Act destroyed Hoellger's exempt status by changing its arrangements with Germany, thereby making its national subject to service in our armed forces and thereafter compelled him to serve, it took away the consideration for the original bargain. Because the government deprived Hoellger of that which it represented to him would be granted, it is in no position to insist upon enforcement of citizenship ineligibility, the price he was paying for that which he did not receive."

Petitioner signed the application for relief under a misconception as to its legal consequences. Under the rule of "elementary fairness" announced in *Moser v. United States,* 341 U.S. 41 (1951), petitioner cannot be held to have waived his right to become a citizen.

In *Moser* the alien applying for exemption from military service believed he could do so without surrendering his right to obtain United States citizenship. This belief was encouraged by advice from the Swiss legation and the United States State Department. Moser testified that had he known that claiming the exemption would debar him from citizenship, he would not have claimed it. (341 U.S. at 45). This Court held that these facts "understandably lulled *this* petitioner into misconception of the legal consequences of applying for exemption." (341 U.S. at 46) (emphasis in original). This Court ordered Moser admitted to citizenship.

In the immediate case petitioner was similarly misled; he misconceived the legal consequences of

his act. He believed as anyone reading the application he signed would believe (see R.T. 74),[3] that in exchange for the forfeiture of his right to become a United States citizen he would, in return, be permanently exempted from military duty (see J.R.T. 7-8). Petitioner would never have executed the application had he not been misled and is accordingly entitled to rely upon the rule of elementary fairness limned in *Moser*.

The District Court held *Moser* inapplicable, reasoning that petitioner knew he would be relinquishing his right to citizenship and had not been misled as to that fact. (Appendix B, p. vii). But the District Court's analysis, with all respect, misses the point; it gives a rule of "elementary fairness" a tortured and grudging reading. What *Moser* holds is that one cannot be held to a surrender of a right as significant as becoming an American citizen when that surrender was done under a government induced misapprehension of fact. That is precisely what happened here. The government neglected to inform petitioner that the "exemption" extended to him was illusory, good only for so long as the government wished it to be good. Instead the government misled him into believing he was signing a release from "liability," a release that did not in fact preclude his liability.

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[3]The application explicitly states that one executing it "shall be relieved from *liability*" (emphasis added). Relief from "liability" connotes removal of obligation, an extinguishment rather than postponement of responsibility.

CONCLUSION

A Writ of Certiorari to the Court of Appeals for the Ninth Circuit should be issued, so that the Court's judgment affirming the judgment of the District Court on the question of petitioner's eligibility for citizenship may be reviewed.

Dated, San Francisco, California,
October 2, 1970.

Respectfully submitted,
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(Appendices Follow)

Appendix "A"

United States Court Of Appeals
For The Ninth Circuit

No. 23,859

Ib Otto Astrup,
Petitioner and Appellant,
vs.
Immigration & Naturalization Service,
Appellee.

[July 8, 1970]

On Appeal from the United States District Court for the Northern District of California

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Before: Chambers and Trask, Circuit Judges, and Plummer, District Judge.

Per curiam:

The decision and order of the district court denying citizenship to Astrup is affirmed. We believe that he is concluded by Lapenieks v. Immigration and Naturalization Service, 9 Cir., 289 F.2d 343, cert. den. 391 U.S. 951.

He made a considered decision initially to claim his alienage as a ground for avoiding military service.

We believe the situation should be tested as of the time his claim was made.

Judge Plummer dissents for the reasons stated by Judge Duniway in his dissent in Lapenieks.

Appendix "B"

United States District Court
Northern District of California

No. 168753

In Re Petition For Naturalization
of
Ib Otto Astrup

MEMORANDUM OF DECISION

This petition for naturalization, brought by Ib Otto Astrup, a native and national of Denmark, is apposed by the Immigration and Naturalization Service.

On July 16, 1968 a hearing was held before this court, oral testimony was taken, and the matter submitted on briefs by both parties.

The undisputed facts of the case are substantially as follows:

On February 20, 1950 petitioner was admitted to the United States for permanent residence. On August 20, 1950 he registered with the Selective Service System. On November 14, 1950 he signed an "Application by Alien for Relief from Training and Service in the Armed Forces." On November 15, 1950, pursuant to Section 4(a) of the Selective Serv-

ice Act of 1948 (50 U.S.C. App. §454(a) (1950)), which provided an exemption from military training and service for aliens, his draft board classified him IV-C (alien not currently liable for military service). In 1951 Congress amended the Selective Service Act of 1948 so that Section 4(a) no longer provided a procedure for the exemption of resident aliens, and on August 6, 1952, pursuant to said change, petitioner's draft board re-classified him I-A (available for military service). On August 18, 1952 it ordered him to report for induction. On September 2, 1952 he was examined and found not physically fit for military service, and on November 24, 1952 his draft board reclassified him V-A (registrant over the age of liability for military service). On May 14, 1965 he filed the pending petition for naturalization.

The Immigration and Naturalization Service opposes this petition on the ground that petitioner is ineligible for citizenship by reason of having applied for and received exemption from military service within the meaning of Section 315(a) of the Immigration and Nationality Act (8 U.S.C. § 1426 (a)), which provides:

> "Notwithstanding the provisions of section 405(b) of this Act, any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States."

Petitioner contends that for three reasons he is not ineligible for citizenship under Section 315(a).

First, he contends that he agreed to become permanently barred from obtaining United States citizenship in return for exemption from military training and service; that the government, by thereafter removing his exemption, failed to keep its part of the bargain; and that, therefore, he should not be bound to keep his part, citing and mainly relying upon the concurring opinion of Judge Moore in *United States v. Hoellger,* 273 F.2d 760, 766 (2d Cir. 1960).

Hoellger held that an alien whose IV-C classification had been removed by the draft because of the abrogation of treaty arrangements with Germany, under which he had been exempted from military service, and who was thereupon inducted into the military service, had not been relieved from service within the meaning of Section 315(a). The Court of Appeals for this circuit adopted *Hoellger* in *United States v. Lacher,* 299 F.2d 919 (9th Cir. 1962), where similarly, the alien's IV-C classification was removed, and he was inducted into the military service. However, in *Lapenieks v. Immigration and Naturalization Service,* 389 F.2d 343 (9th Cir. 1968), *cert. denied,* 391 U.S. 951 (1968), where the alien's IV-C classification was also removed, but he was not inducted into military service because, as in the instant case, he failed to pass the pre-induction physical, the court, refusing to extend *Hoellger,* held that the alien had been relieved from military service within

the meaning of Section 315(a). We conclude that this court is bound by *Lapenieks,* and that, therefore, petitioner's first contention is without merit.

Secondly, petitioner contends that he signed the application for relief from military training and service under a misconception as to its legal consequences, in that he believed that by so doing he would be permanently exempted from military service, and he would not have signed the application for relief if he had known that the government retained the right to remove his exemption and call him for service; and that, therefore, he cannot be held to a waiver of his right to become a citizen, citing and mainly relying upon *Moser v. United States,* 341 U.S. 41 (1951).

In *Moser,* an alien applied for exemption from military service, but, due to assurances made to him by the Swiss legation and the U.S. State Department, he believed that he could do so without surrendering his right to obtain U.S. citizenship. The Supreme Court held that he was understandably lulled into a misconception of the legal consequences of applying for exemption and could not, therefore, be held to have waived his right to United States citizenship.

In the present case, petitioner testified that, when he applied for exemption, he did not know that the government could later remove his exemption and that, had he known this, he would not have applied for exemption. (R.T. of July 16, 1968 hearing, p. 7, line 20 to p. 8, line 21). He has also testified, however, that, when he signed the application for exemp-

tion from military training and service, he knew that he would thereby become ineligible for United States citizenship. (Transcript of Preliminary Examination by Naturalization Examiner, September 2, 1966, pp. 7, 9). Therefore, unlike *Moser,* he was not lulled into any misconception about the legal consequences of applying for exemption. Accordingly, the court finds that petitioner did knowingly relinquish his right to United States citizenship. *Moser* is therefore inapplicable, and petitioner's second contention is without merit.

Thirdly, petitioner contends that if he had been found physically fit, he would have served in the military and would now be eligible for citizenship under *United States v. Lacher, supra,* despite the fact that he was once relieved from service on the ground of alienage; and that to permit or deny citizenship on the basis of one's success in passing a military physical fitness test constitutes an unreasonable classification, violative of the due process clause of the Fifth Amendment.

No such claimed unreasonable classification is found in the statute itself, nor does it necessarily stem from the statute. Any such claimed unreasonable classification is merely the incidential result of the judicially declared rule of *Lapenieks* in this circuit, to the effect that upon facts similar to those in the pending case, an alien has been effectively relieved from service and is, therefore ineligible for citizenship under Section 315(a). Therefore petitioner's third contention is without merit.

Accordingly, it is the order of this Court that the petition for naturalization of Ib Otto Astrup be, and the same is, hereby denied.

Dated: November 14th, 1968.

W. T. Sweigert
United States District Judge